IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JACK WILLIAM WOLF,	:	
	:	C.A. No. 04-1385-GMS
Plaintiff,	:	
	:	JURY TRIAL DEMANDED
v.	:	
	:	
THOMAS CARROLL, DCC	:	
MEDICAL DEPARTMENT, C/O PUSEY,	:	
C/O CARTER and LT. SEACORD,	:	
	:	
Defendants.	:	

MEMORANDUM OF POINTS AND AUTHORITIES OF CORRECTIONAL MEDICAL SERVICES, INC. IN SUPPORT OF ITS MOTION TO DISMISS

Statement of Facts

CMS is a private corporation that has provided medical care for inmates. CMS contracted with the State of Delaware to provide medical services in Delaware prisons from July 1, 2000 until June 30, 2002.[1]

Plaintiff, Jack William Wolf, was incarcerated in the Delaware Correctional Center ("DCC") when he filed a Complaint in this matter on October 10, 2004, pursuant to 42 U.S.C. § 1983.[2] Plaintiff names as Defendants "Warden Thomas Carroll and DCC Medical Department and c/o Carter, c/o Pusey and Lt. Seacord." D.I. 2 at § III C. Plaintiff claims that "medical staff" denied him treatment for a golf-ball sized tumor on his left testicle and injuries sustained to his back and hand. Notably, plaintiff attaches grievance reports to his complaint, dated December 18, 2002, December 20, 2002, June 8, 2004, August 14, 2004, September 13, 2004. D.I. 2.

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[1] On July 1, 2005, CMS began its current tenure at DCC.

[2] 42 U.S.C. § 1983 reads, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory…subjects, or causes to be subjected, any citizen of the United States…to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in the action at law, suit in equity, or other proper proceeding for redress.

A. Standard of Review

A claim may be dismissed because it fails to allege sufficient facts to support a cognizable legal claim.[3] Furthermore, the Complaint "must provide the defendants with fair notice of what plaintiff's claim is and the grounds upon which it rests."[4] Moreover, even a *pro se* litigant must plead sufficient facts to sustain a legal claim.[5] A motion to dismiss for failure to state a claim upon which relief can be granted should be awarded in the event that it is "beyond a doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[6]

B. Legal Arguments

1. PLAINTIFF'S CLAIMS AGAINST CMS[7] ARE BARRED BY THE STATUTE OF LIMITATIONS

The statute of limitations applicable to suits brought under 42 U.S.C. §1983 are determined by each state, and, for this purpose, §1983 actions should be characterized as personal injury actions.[8] In Delaware, the statute of limitations to be applied in §1983 actions is the two-year limitation period set forth in § 8119.[9]

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[3] Federal Rule of Civil Procedure 12(b)(6).

[4] United States v. City of Philadelphia, 644 F.2d 187, 204 (3d Cir. 1980), *citing Conley v. Gibson*, 355 U.S. 41, 47 (1957).

[5] See Riddle v. Mondragon, 83 F.3d 1197, 1202 (10th Cir. 1996).

[6] Conley v. Gibson, 355 U.S. 41, 45-6 (1957).

[7] Important to note is that "CMS" is not named as a defendant in this matter. Rather, plaintiff names the "DCC Medical Department ". At the time suit was filed, another entity was providing medical services to Delaware inmates. Months later, when service of process was attempted upon the "DCC Medical Department", CMS was the contract provider of healthcare services to Delaware inmates. Thus, CMS asserts that process and/or service of process is improper.

[8] Wilson v. Garcia, 471 U.S. 261 (1985).

[9] McDowell v. Delaware State Police, 88 F.3d 188, 190 (3d Cir. 1996); Carr v. Town of Dewey Beach, 730 F. Supp. 591 (D. Del. 1990); Marker v. Talley, 502 A.2d 972 (Del. Super. Ct. 1985).

Plaintiff's 42 U.S.C. § 1983 claims against CMS should be dismissed as they are barred by the applicable two-year statute of limitations, 10 Del. C. § 8119.[10] Any conduct which could conceivably give rise to plaintiff's constitutional claims must necessarily have occurred within the CMS tenure, sometime between July 1, 2000 through June 30, 2002. Logically, *the statute of limitations for any alleged constitutional violation as to CMS expired on or before June 30, 2004*.

Not only has plaintiff failed to allege the specific date of the alleged civil rights violation against CMS in the Complaint, the Complaint was filed on October 14, 2004, *more than two years after the last date that CMS served as health care provider at DCC, and eight months prior to the beginning of the latest CMS tenure at Delaware prisons.* Plaintiff's claims are absolutely barred by §8119. Plaintiff can not, and does not, state a cognizable claim against CMS.

2. **PLAINTIFF FAILS TO ALLEGE PERSONAL INVOLVEMENT OF CMS**

Additionally, in order to be liable in a civil rights action, a defendant must have personal involvement in the alleged wrongs.[11] "Personal involvement" may be demonstrated through "allegations of personal direction or of actual knowledge and acquiescence." These allegations, however, must be made with appropriate particularity.[12]

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[10] 10 Del. C. § 8119 states, in pertinent part,
No action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of 2 years from the date upon which it is claimed that such alleged injuries were sustained….

[11] Specifically, the Third Circuit has held that:

> A defendant is a civil rights action must have personal involvement in the alleged wrongs; liability cannot be predicate solely on the operation of *respondeat superior*. Personal involvement can be shown through allegations of personal discretion or actual knowledge and acquiescence, however, must be made with appropriate particularity.

Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988)(citations omitted).

[12] Id.

CMS could have no personal involvement in any alleged wrongs. CMS was not in any correctional facility in the State of Delaware during the time periods that seem to be alleged in plaintiff's Complaint. Plaintiff's Complaint should be dismissed against CMS.

Furthermore, plaintiff's substantive claims must fail. CMS may only be held liable for a policy or custom that demonstrates deliberate indifference to plaintiff's serious medical needs.[13] Plaintiff appears to name "DCC Medical Department" as a defendant based on the activities of CMS employees, *respondeat superior is not a viable theory of liability under* 42 U.S.C. § 1983.[14]

Plaintiff's Complaint under 42 U.S.C. §1983 lists "DCC Medical Department" as a defendant, but makes no allegations specifically against CMS. The complaint does not name a individual health care provider, nor does it attribute "personal involvement" by any individual. D.I. 2. More importantly, Plaintiff has failed to allege any unconstitutional policy or custom against "DCC Medical Department", nor has he alleged that the execution of such policy or custom caused any alleged constitutional tort.

Thus, the Complaint fails to allege that CMS, or "DCC Medical Provider", is in any way responsible or liable for the purported violations of plaintiff's civil rights alleged therein. Again, during the relevant time period, CMS was not the health care provider at DCC. The allegations against CMS should be dismissed pursuant to Fed. R. Civ. P. 12 (b)(6).

3. PLAINTIFF FAILS TO ALLEGE DELIBERATE INDIFFERENCE TO A SERIOUS MEDICAL NEED

In order to state a claim for violations of the Eighth and Fourteenth Amendments in a case alleging inadequate medical treatment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency.'"[15]

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[13] Miller v. Correctional Medical Systems, Inc., 802 F. Supp. 1126 (D. Del. 1992), citing Monell v. Dept. of Social Services, 436 U.S. 658 (1978).

[14] Id.

The Estelle test has two components, the first of which requires that the plaintiff shows a serious medical need.[16] To satisfy the "deliberate indifference" portion of the Estelle test, a plaintiff must allege that a defendant either acted with reckless disregard for, or with an actual intent to disregard, his medical condition.[17] In Farmer v. Brennan,[18], the Supreme Court set forth a subjective person standard for the purpose of determining deliberate indifference:

> We hold… that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health and safety; the official must be aware of facts from which the could be drawn that a substantial risk serious harm exists, and he must also draw the inference.

"Thus, under this prong, a prisoner must show not only that the official knew of the serious medical need, but also that he or she consciously disregarded it."[19] However, the Estelle Court has also clarified the standard in that:

> an inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.[20]

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[15] Estelle v. Gamble, 429 U.S. 97, 106 (1976), citing Trop v. Dulles, 356 U.S. 86, 101 (1958).

[16] Boring v. Kozakiewicz, 833 F.2d 468, 473 (3d Cir. 1987)(quotations and citations omitted), cert. denied, 486 U.S. 1006 (1988).

[17] Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985).

[18] 511 U.S. 825, 834 (1994).

[19] Waller v. O'Day, Civ. A. No. 96-45 RMM, McKelvie, J., slip op. at 9 (D. Del. 1996)(citation omitted).

[20] Estelle, 429 U.S. at 105-06 (citations omitted).

At best, Plaintiff alleges solely *negligent* treatment of medical condition(s). Specifically the inmate claims he slipped and fell on a wet floor, injuring his right shoulder and was give a shot of hydrocortisone. D.I. 2 at § IV, entitled "Statement of Claim". The inmate further states he injured his back, and did not get an x-ray as he deems appropriate. Id. The inmate also states he has a tumor on his testicle, which was x-rayed. Id. As Estelle explains, these are not a cognizable claims under the Eighth Amendment. "[T]he question whether an X-ray -- or additional diagnostic techniques or forms of treatment -- is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment."[21]

Plaintiff fails to identify an act or omission with deliberate indifference performed by any individual person from DCC Medical Department, let alone CMS, that would state a claim under the Eighth Amendment. Therefore, even if the factual allegations of the plaintiff's Complaint are accepted as true, as is required in a ruling on a Rule 12 (b)(6) Motion,[22] plaintiff fails to allege facts which would pass the Estelle test. Plaintiff fails to allege that CMS, or any contract provider of healthcare services constituting DCC Medical Department, knew of a serious medical need *and* that such serious medical need was consciously disregarded. Plaintiff's Claims should be dismissed pursuant to Fed. R. Civ. P. 12 (b)(6).

Moreover, the prisoner's claims are inconsistent with the records he provided with the Complaint. The inmate claims he failed to receive medical treatment by the medical department at DCC. There are *fourteen* Health Care Services Fee Sheets, indicating that the prisoner was receiving health care services. Moreover, there is a Form # 584[23] Grievance of 11/1/2003 wherein the inmate grieves over being charged for his medications. There is a letter dated

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[21] Estelle, 429 U.S. at 107
[22] Cruz v. Beto, 405 U.S. 319, 322 (1972) (per curiam).
[23] A Form #584 is not a *medical* grievance form; instead the medical grievance is Form #585.

September 9, 2004 to the Clerk of this Court, attached to the Complaint, in which the inmate claims "the only thing the prison will do is give us Motrin for pain. [Another inmate] and I both need operations and the right kiropractors [sic]." Again, as Estelle explains, these are not cognizable claims under the Eighth Amendment since a "*mere difference of opinion between the prison's medical staff and the inmate as to the diagnosis or treatment which the inmate receives does not support a claim of cruel and unusual punishment*."[24]

3. PLAINTIFF FAILS TO EXHAUST ADMINISTRATIVE REMEDIES

The plaintiff has failed to exhaust his administrative remedies available to him as required by the Prison Litigation Reform Act of 1996. 42 U.S.C. §1997e (a) provides that:

> No action shall be brought with respect to prison conditions under Section 1983 of this title or any other Federal law, by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies as are available to him are exhausted.

The Courts have upheld the requirements of 42 U.S.C. §1997e (a), and stated that an inmate must first exhaust all the administrative remedies available to him/her prior to filing a §1983 action premised upon prison conditions.[25] Prison conditions have been defined to include the environment in which the prisoners live, the physical conditions of that environment and the nature of the services provided therein.[26]

The Delaware Department of Corrections has established administrative procedures that an inmate must follow to file a *medical* grievance. See Exhibit "A", at 6. An inmate must file a grievance with the Inmate Grievance Chairperson (IGC) who then forwards it to the medical staff for review. If action needs to be taken, the medical staff is required to attempt an informal resolution of the grievance with the inmate. If the grievance cannot be resolved informally, the grievance is forwarded to the Medical Grievance Committee to conduct a hearing.

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[24] Estelle, supra, n. 21. See also, Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980); Fitzgerald v. Septer, 1998 U.S. Dist. LEXIS 23397, C.A. No. 97-663-JJF at 2 (D. Del. July 27, 1998) (holding that claim alleging mere dissatisfaction with medical care administered to prisoner is insufficient to support cognizable claim under § 1983); Johnstone v. United States, 980 F.Supp. 148, 153 (E.D. Pa. 1997).

[25] Nyhuis v. Reno, 204 F.3d 65, 67 (3rd Cir. 2000); see also Booth v. Churner, 206 F.3d 289, 294-295 (3d Cir. 2000) cert. granted, No. 99-1964, 2000 WL 798208 (Oct. 30, 2000) (§1997 e (a) is applicable to all inmate claims except those challenging the fact or duration of confinement); Boyd v. Department of Corrections, 2000 WL 1073324 (E.D. Pa. 2000) (An inmate must exhaust his administrative remedies even when prison officials ignore his grievances).

[26] Booth, 206 F.3d at 291.

If the medical grievance hearing decision does not satisfy the inmate, the inmate may complete a Medical Grievance Committee Appeal Statement which is then submitted to the Bureau Grievance Officer. See Exhibit "A", at 7. The Bureau Grievance Officer recommends a course of action to the Bureau Chief of Prisons, who renders a final decision.

It is clear from the Complaint that the plaintiff is complaining about a prison condition which under 42 U.S.C. §1997e (a) required him to exhaust all the administrative remedies available to him. It is equally clear from a review of the Complaint that the plaintiff never exhausted his administrative remedies made available by the Delaware Department of Corrections. This plaintiff admits that "grievance forms" were submitted, but provides no information as to whether the *medical* grievance forms and procedures were completed at the time he filed this action.[27]

42 U.S.C. §1997e (a) should be applied without exception to promote the policy behind the exhaustion requirement, which is to allow the Department of Corrections an opportunity to discover and correct mistakes.[28]

It is clear from plaintiff's Complaint that he is complaining about a prison condition which, under 42 U.S.C. §1997e (a), requires him to exhaust administrative remedies available to

[27] Plaintiff asserts that he filed "grievance forms", however, the result was "[t]hey lied to me, they said that they would give me medical treatment and did nothing." D.I. #2. In the attachments to plaintiffs' Complaint, there are several grievance forms, medical and other, although none seem to address the issues of the prisoner's focus, or relief sought, in the Complaint: denial of X-rays and other "medical treatment" the prisoner deems appropriate.

[28] O'Neil v. Kearney, et al., C.A. No. 99-849-SLR, Memorandum Order (Robinson, J. Nov. 6, 2000) See attached Exhibit "B".

him. From the forms filed in conjunction with the Complaint, it is unclear whether any *medical* grievances were filed as to the allegations in the prisoner's Complaint, let alone whether such medical grievance procedures were exhausted.

WHEREFORE, defendant respectfully moves this Honorable Court to grant dismissal, with prejudice, in its favor and against plaintiff.

MARSHALL, DENNEHEY, WARNER,
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